UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

--------------------------------X		**Docket#**
HEMAD JANFESHAN,	:	16-cv-06915-ARR-LB
Plaintiff,	:	
	:	
- versus -	:	U.S. Courthouse
	:	Brooklyn, New York
	:	
DEPARTMENT OF HOMELAND,	:	
SECURITY, et al.,	:	January 17, 2017
Defendant	:	
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TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE
BEFORE THE HONORABLE LOIS BLOOM
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:

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THE CLERK: Civil Cause for Telephone Conference, docket number 16-cv-6915, Janfeshan v. Department of Homeland Security et al.

Will the parties please state your names for the record?

MS. AHMAD: Naz Ahmad for the plaintiff.

MR. ISMAIL: Tarek Ismail for the plaintiff.

MR. KASSEM: Ramzi Kassem for the plaintiff.

MR. SCHACHNER: Elliot Schachner, Assistant United States Attorney for the defendants.

THE CLERK: The Honorable Lois Bloom presiding.

THE COURT: Good morning, everybody. How is everyone today?

MR. SCHACHNER: Good morning, Judge.

MS. AHMAD: Good morning.

MR. ISMAIL: Good morning, your Honor.

THE COURT: This is a telephone conference in the plaintiff's civil rights action. On December 29th, I allowed Customs and Border Protection to conduct a border search of plaintiff's phone, except that I said CBP and any filter teams shall not open or review any communications between plaintiff and his counsel.

And defendants state that they have returned the phone to plaintiff but they've been unable to move forward because they're unable to strictly comply with the Court's order and therefore, they request a modification of the order to allow for the opening and review of the potentially privileged material by a filter or taint team and the filter team would then make all reasonable efforts to segregate the privileged material. And the defendants request that plaintiff provide additional information that would facilitate CBP's ability to determine whether or not the communication was with one of the seven identified individuals.

The letter was responded to by plaintiff's counsel on January 13th and plaintiff's counsel first off, added two more people to the list. So, Mr. Schachner, now there is nine people. I would like first, who is Jo Jo Annabile and Mustapha Ndanusa? Who are these people?

MS. AHMAD: Yes. Good morning, your Honor. This is Ms. Ahmad. Thank you for rescheduling.

Jo Jo Annabile is -- well, currently he is the executive director of immigration at (indiscernible) fellowship program. He helped Mr. Janfeshan submit his N400 application. And Mustapha Ndanusa is an attorney in Brooklyn who Mr. Janfeshan retained prior to retaining us and was representing Mr. Janfeshan with respect to (indiscernible).

THE COURT: Thank you. So, those two should be added, Mr. Schachner, to the list of people that they should not be reviewing the communications between.

It just surprises me that Mr. Janfeshan would forget that when he was first giving us the list of names but I am satisfied on your proffer.

Okay. So look, Mr. Schachner, I don't really understand what your needs are and, of course, now the plaintiffs look at that letter as an opportunity to look into what type of review the CBP is able or wants to perform with what types of programs and I don't want to get into any of that.

First of all, I don't believe that this is ripe for discovery at this point. There is no motion that's been made. And again, this is just talking procedurally, this is an unusual case, Ms. Ahmad, Mr. Ismail and Mr. Kassem. As you know, I first was involved with this because Mr. Janfeshan was trying to get a boarding FOIL to return to the United States. Once that was accomplished, Judge Ross and I directed that that case be closed. That was closed by voluntary discontinuance and this case was opened.

But prior to that case being closed, you had made motions in that case where the government consented to not search the phone pending further order of the Court. The new case was filed on a complaint. There was no motion that accompanied the new filing. And I declined to set up a motion schedule because I did not feel that there was a basis for this. I don't even know the basis for the case going forward on the complaint but we're not up to that because the complaint, I believe, is just in the process of being served on the government.

So, we're really at an in between point. We did have an argument. I don't think Mr. Kassem, that you were on the phone at the time. I believe it was Ms. Ahmad and Mr. Ismail at that time and they had pointed me to a number of different cases, House (ph.) being the number one case, Jabow (ph.) being another case.

I looked at all of those cases and did not think that this case was on all fours with either of the cases that had been cited to the Court.

The new letter, although it's clear that you're asking for certain information, there's not a single case that's relied on in the plaintiff's letter of why you would be entitled to such information. And I do understand that there may be remedies if you believe your clients rights are violated after the fact, but we talked about this a bit at the last conference, that I don't think that there are any procedures that you're entitled to find out about in advance of the search of the phone and you're asking for a special master or some courtappointed filter team to ensure the security of the information on the phone that I intended to protect, well I do intend to protect the attorney-client privilege materials and that's clear from the record of the Court.

And if there was any violation of that by CBP, your client would have his remedies if they tried to use that information in any way at any further proceeding.

So, I don't really see why this case should be different than all other cases where people have electronic devices seized at the border. But I put this on, so I could give you a chance to try to convince me but I am putting it on the record that I believe that whatever the procedures are that generally are taken when somebody comes through the border and they want to do a more fulsome search of that electronic device. I believe those are the procedures that I am going to put in place with the proviso that the attorney-client privileged materials between Mr. Janfeshan and the people who have been enumerated to the government should not be looked at and should be kept separate and whether it's the filter team or the taint team, I don't care what they call their team, they would have to make all reasonable efforts to keep that privileged material away from whoever else is reviewing the communications that are on Mr. Janfeshan's phone.

So, who wants to be heard on this on behalf of plaintiff?

MS. AHMAD: Your Honor, it's Ms. Ahmad. Just -- the last conference, I was sactually not here. I was (indiscernible).

THE COURT: That's right. I'm sorry. You were out. I'm sorry, thank you.

MS. AHMAD: But to your main point, your Honor, really the reason why we're asking for that information is so that we can, you know, provide the protection that your order -- your original order of December 29th does, which is provide significant protection for the attorney-client privilege.

THE COURT: How are you going to provide protection for it? Quite frankly, the government is put on notice and if they violate that order, it's at their peril. Then they're probably going to have something that limits the use of that material.

So, I don't understand why you think that you're involved in that.

MS. AHMAD: Well, your Honor, to the extent that we're trying to facilitate the actual search of his phone --

THE COURT: No, you're not trying to facilitate it. You haven't done anything except turn over the names of people that the government should not look because you're claiming there's an attorney-client privilege. You're not facilitating the search. You haven't provided any of his codes. I don't see what your argument is here.

MR. ISMAIL: Your Honor, if I might be heard, this is Tarek Ismail for the plaintiffs.

You know, at the last conference your Honor made it pretty clear to the government to the government that you envisioned potential for a search which would comply with the Court's order and that the government should be able to siphon off this information in such a way to comply with the Court's order.

Now the government comes back and says that they're not able to do so and we --

THE COURT: But quite frankly, Mr. Ismail, neither you nor I are an expert in how the government conducts its searches --

MR. ISMAIL: I agree.

THE COURT: -- of what sort of electronics they use but that does not mean that you're now entitled to get discovery and expand the scope of the lawsuit because they couldn't comply with the letter of my order. My order may not have been drawn to take into consideration.

In fact, Mr. Schachner, his first appearance on the case was at the last conference. He told me he wasn't sure that they would be able to comply. I sort of, you know, bull in the china shop put my head down and said you will comply.

I again want to be clear with the government that they should segregate out the attorney-client privileged materials. They should not look at or discuss or use those materials in any way you've identified the names of the people that they should not look at.

And this, I don't think is so different than any other case where there are searches done. I just think that you brought this as a prophylactic strike instead of bringing it after the fact of the search.

I don't think they're so much different about this case. You've just said here are attorney-client privileges that attach to these communications. Government, don't look at those communications. I don't think that's so different than many other cases that are brought before the Court. You've just done it prophylactically, as your client was coming through the border.

MR. ISMAIL: Your Honor, if I might just respond. You know, we're not looking for discovery.

The defendant brought this motion without consulting with us in advance.

THE COURT: I do take that point to heart. Mr. Schachner, you have the obligation to try to work out things with defendant's counsel if you can. But I beg to differ with you, Mr. Ismail, on page 2 of your letter, you say, "At a minimum, we ask that defendant CBP identify which software they have used to conduct the forensic extraction and which software they intend to use to conduct the search of the contents of Mr. Janfeshan's phone. And to that end, we want this information to verify their claims."

I mean, that's discovery.

MS. AHMAD: Your Honor, the reason we're asking that is depending on the type of extraction that was done, they could have already segregated certain information when they took a copy of his phone.

THE COURT: They could have but that's not something you're entitled to. So, again, we're still at this limbo where the complaint has not yet been served on the defendants. Maybe it was just served.

Mr. Schachner, do you have any information regarding whether your clients have been served?

MR. SCHACHNER: As of Friday, CPB was not served and this office was not served.

THE COURT: So again, until they have to respond which in a federal complaint -- I'm sorry, a summons to the government, they get sixty days to respond. So, we're ahead by just having a conference on the phone. But what I do want to say, Mr. Schachner, when there is an order of the Court and there was some disagreement between the parties, you should have tried to do this on consent because if you could have spoken to plaintiff's counsel and agreed that the taint team would segregate out these communications and therefore, you could have asked jointly for an order of the Court that would use the language that could effectuate the intent of the Court's order, even if I didn't say it the way I should have. That would have made my life easier.

Now, I am not saying that the plaintiffs would have agreed. They have may have asked for more than what you thought that they are entitled to and then you could have brought that to me after trying to resolve it with them but I do think that point is well taken by plaintiff's counsel. That you made no effort to contact them to see if you could come up with language that would suit both sides.

MR. SCHACHNER: I apologize, your Honor. Again, I didn't think that the discovery rules applied here because there hasn't been any discovery. In fact, as your Honor just mentioned, the complaint has not been served. Also, I --

THE COURT: Well, I agree with that but I'm just saying my order was --

MR. SCHACHNER: Okay.

THE COURT: -- for something to happen and frankly, I didn't know that they were going to take the copy and return the phone. So, that that's already happened, I'm glad that Mr. Janfeshan has his phone. And now I just want to get on with things here.

I don't think that we're going to schedule any discovery until there is service on the government and then the government may respond by a motion instead of by answering and then there may not be discovery at all.

But right now, all I have is the letter which is the motion to amend, correct and supplement by the government and the responsive letter by the plaintiff's counsel. So, that's what I would like to resolve. So, how do you propose the order be amended, Mr. Schachner, that would allow CBP to get on with its search but still comply with the Court's order?

MR. SCHACHNER: Basically that the order provide that CBP can conduct a border search of the cell phone or of the copy of the cell phone in accordance with CPB's normal procedures which includes among other things, the use of the taint team to review the material for privileged or potentially privileged communications.

And we would also like that the defendants -- that the plaintiff, rather, be directed to forthwith provide that additional information that we asked for such as the screen names, phone numbers, e-mail addresses of all nine -- (indiscernible) are now up to now, in order to facilitate the identification of potentially privilege communications.

THE COURT: Plaintiff's counsel?

MS. AHMAD: Your Honor, one thing is I would like to point out again is we're not asking for anything more than what defendants have actually asked us for, more information to conduct the search.

With respect to the filter team, our request in order to protect the attorney-client privilege would be that the filter team report directly to the Court in the first instance.

THE COURT: Why?

MS. AHMAD: Well, your Honor, to the extent that we don't know how they determine what is considered privileged communications and also that our concern about privileged communications be retained in a database that CBP has or if it's, you know, vulnerable to attack or --

THE COURT: Again, you know, I don't want to be dismissive of your concerns on behalf of your client but your client entered the country with this phone. I am not going to direct that he be treated differently than anybody else would be treated and then again, I say to you that you have your remedies if they don't comply with the Court's order.

I don't know that there's anything else I could say to you, Ms. Ahmad. I am not going to require CPB to treat Mr. Janfeshan's phone differently than they treat any other phone at a border search. They've already imaged the phone and returned it to him. You've provided the names of nine individuals. I don't know if you want to give more information to try to protect your client as to e-mails but if you're not going to, I am just going to direct them to segregate that information, not to report to me because that's not what is done in border searches.

Again, if there's ramifications down the road, you have the record, you have my order that they were supposed to segregate this and not open it and use it for any purpose.

So again, they still are going to be directed to make all reasonable efforts to segregate the privileged material. I don't know what your position is about providing additional information to facilitate their ability to determine whether a communication was sent to or from one of these nine individuals but if you are not going to tell them to make their best efforts.

MS. AHMAD: Right.

THE COURT: And I am going to tell them to complete their search by a date certain, so that we know that they're done.

MS. AHMAD: Your Honor, as we stated in our letter, we would be willing to provide phone numbers and e-mail addresses of the individuals who would have privileged communications with Mr. Janfeshan.

And to an earlier point made, the summonses were sent out on Thursday by certified mail. So, I can expect that they will be delivered either today or tomorrow.

THE COURT: Again, I am not going to be involved in the intricacies. You understand that under the federal rules that when you're serving an agency or a head of an agency, that you have to deliver a copy to the United States Attorney, deliver it down to Washington.

MS. AHMAD: Yes, your Honor.

THE COURT: And so again, I am not going to involved in checking. I am just letting you know that from the date that they receive a summons, they have 60 days under the federal rules to respond.

So, I don't expect this to be on the top of the pile for some period of time. And then it may be that they choose to answer or they may approach Judge Ross and ask to move against the complaint. I don't know what the government intends.

But I wanted to get this resolved, so that Mr. Janfeshan could get on with his life here and that the attorneys can make their plans but I am not going to get more involved at this point in time.

You're saying that you would provide the phone numbers and e-mail addresses for the people who are on Mr. Janfeshan's phone. How quickly can you do that, Ms. Ahmad?

MS. AHMAD: It would take a couple of days. We have to confirm with counsel that's not part of our office (indiscernible).

THE COURT: So, by Friday?

MS. AHMAD: Yes.

THE COURT: Friday, the 20th?

MS. AHMAD: That's fine. Yes.

THE COURT: Okay.

So, Mr. Shachner, assuming that you get the phone numbers and e-mail addresses for the nine individuals by Friday, how much time is the agency asking for to complete the search?

MR. SCHACHNER: A little hard to say, your

Honor, because we don't know what's on th phone. We don't know if there are any other technological obstacles that may develop. It's a little hard to say. Also, of course, I mean, the taint team, of course, does involve some additional time.

So, what I would suggest is why don't we establish that a target date for completion of February 28th, with the understanding that it's some -- if there's some issue or issues that come up, we would contact counsel first and we can't resolve it, then approach your Honor again.

THE COURT: I think that's acceptable Mr. Schachner. So, just basically I want you to convey to your clients that they should move on this.

MR. SCHACHNER: Of course.

THE COURT: That I know that there is a lot of other pressing business for them but they should move on this, okay?

MR. SCHACHNER: That's fine, your Honor.

THE COURT: So --

MR. KASSEM: Your Honor?

THE COURT: Yes.

MR. KASSEM: If I may, this is Ramzi Kassem. We will try to avoid to serving the Court unless it's absolutely necessary. As Ms. Ahmad said, we are going to reach out to counsel outside of our law firm to gather all of their e-mail addresses and phone numbers with which they have communicated with Mr. Janfeshan.

In the event that one of those lawyers is out of town or on vacation or otherwise unreachable, we will communicate that to Mr. Schachner by Friday and we'll try to work things out.

THE COURT: That's fine but what I was going to say to do you, Mr. Kassem, is your client, Mr. Janfeshan, should have this information on his phone. He was the one who had communications with this person and whether they're out of town and they can provide their phone number, if it's on his phone, that's what we need. We don't really need you -- I'm not going to try to interrupt your getting in touch with these people, but we clearly should be able to get this information from Mr. Janfeshan because that's what you're trying to protect, what is on his phone and they've now returned his phone. So, he shouldn't be able to say I don't remember the number. It should be there.

So, I am going to ask you to do your very best by Friday. That's what the order of the Court is going to be. If for any reason, it's not supplied, Mr. Schachner's, of course, going to ask for more time down the road and I would imagine you just want this to be done, so that you could advise your client, okay, February 28th has come and gone. Nobody has knocked on your door or called you in for an interview. So, I think we're okay.

Maybe it will take longer. I have no idea. But I just want you to do your part, so that the government will do their part, so Mr. Janfeshan could get back to his daily life.

May I ask, it's not part of the case, Ms. Ahmad, but did Mr. Janfeshan's family rejoin him?

MS. AHMAD: No, your Honor. He's still -- just started a new job at the TLC Commisison and found a place to lvie, so he is saving up money for their return.

THE COURT: Okay. Well again, is there anything else that I can address on behalf of the plaintiffs before we adjourn?

MR. ISMAIL: Your Honor, there is another matter that we need to, I think, collectively give some thought to which is the fact that as you noted, your Honor, the defendant is now retained a full copy of Mr. Janfeshan's phone and that inclues the privilege informaiton.

And we need to give some thought to whether that portion of the information they retained is something they can segregate and destroy or will they retain that information in their databases on a forward going basis indefinitely?

THE COURT: Well, thank you for that thought.

Anything else, Mr. Shachner, before we adjourn?

MR. SCHACHNER: Well, I think it's a little premature to address that, your Honor. Other than that, nothing else.

MR. ISMAIL: Well, your Honor, we will try to raise it with the Court then at a later point when hopefully it won't be premature.

THE COURT: Well, and I also want to make sure, you know -- I think I've said this before, Mr. Ismail, but if I haven't, you don't want to create bad law and again, I'm not trying to prejudge either side of this argument about what the government does when it has communications that it's copied from somebody's laptop or computer or cell phone and this is not in a criminal context. It's a border search. So, I do understand that it's very different.

But without you giving me case law and some precedent for it and again, I do not find the cases that you cited in the first instance to be on point. I thought that they were quite different.

The House case, the man's computer had been seized during a border search but not returned for a good length of time. I forget if it was a month and a half or more and that was a First Amendment case. And I believe that the district judge up in Massachusetts did not dismiss that case because of the length of time that the government had retained the journalist's laptop.

So again, I know that there's not a whole lot on these points of, you know, electronic border searches and I do know that you were making by analogy some points that you wanted the Court to consider but I do want you to understand that we are moving forward in the case. We are not yet in discovery because issue has not been joined.

I did act on the government's letter by getting you on the phone. I will also make sure that you have your chance to put your client's position on the record but at this point in time, I am going to amend the order as requested by the government and I am going to direct that the plaintiff provide by Friday, the phone numbers and e-mails of the individuals who are on the phone who are protected by attorney-client privilege -- the communications with plaintiff are protected by attorney-client privilege and then the government shall make all efforts to have the search completed by February 28th, 2017.

And with that, we are adjourned. Thank you very much.

MS. AHMAD: Thank you, your Honor.

MR. SCHACHNER: Thank you.

MR. ISMAIL: Thank you.

(Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this **18th** day of **January**, 2017.

Linda Ferrara

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